

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

RULE ON MOTIONS CONCERNING  
MAIL PREPARATION CHANGES

Docket No. RM2016-6

**UNITED STATES POSTAL SERVICE COMMENTS ON PROPOSED RULES  
FOR MOTIONS CONCERNING MAIL PREPARATION CHANGES**  
(September 2, 2016)

Pursuant to Order No. 3048, the United States Postal Service hereby submits its initial Comments on the Commission's proposed rules establishing a procedure under which interested parties may seek to demonstrate that a mail preparation change announced by the Postal Service requires compliance with the price cap under 39 C.F.R. § 3010.23(d)(2).

**INTRODUCTION**

On January 22, 2016, the Commission issued Order No. 3047, setting forth the standard it plans to use to determine when changes in mail preparation requirements implicate the price cap.<sup>1</sup> On the same day, the Commission initiated this parallel rulemaking, proposing to establish a procedure and timeframe under which interested parties may initiate proceedings to demonstrate that a mail preparation change implicates the price cap under that standard despite the fact that the Postal Service does not designate the change as being subject to the cap.<sup>2</sup> The Postal Service filed a

---

<sup>1</sup> Order No. 3047, Order Resolving Issues on Remand, PRC Docket No. R2013-10R (Jan. 22, 2016).

<sup>2</sup> Order No. 3048, Notice of Proposed Rulemaking on Motions Concerning Mail Preparation Changes, PRC Docket No. RM2016-6 (Jan. 22, 2016).

Motion for Reconsideration of Order No. 3047 on February 22, 2016,<sup>3</sup> and the Commission suspended proceedings in this docket while the Motion for Reconsideration was pending. Following its decision on the Motion for Reconsideration, which was published as Order No. 3441 on July 20,<sup>4</sup> the Commission reopened this rulemaking proceeding.

The Postal Service respectfully disagrees with the Commission's decision on its Motion for Reconsideration, and has filed a Petition for Review of Order No. 3441 with the United States Court of Appeals for the District of Columbia Circuit.<sup>5</sup> The principal issues in that Petition for Review concern the substantive standard the Commission announced for determining when changes in mail preparation procedures constitute "changes in rates" that require compliance with the price cap. The Postal Service understands that this rulemaking, on the other hand, is intended to address the procedural requirements for motions challenging planned mail preparation changes. Accordingly, the following comments focus on the Commission's proposed procedural requirements rather than the substantive standard that will be applied in deciding the merits of a motion.

---

<sup>3</sup> Motion for Reconsideration of Order No. 3047, PRC Docket No. R2013-10R (Feb. 22, 2016) [hereinafter "Motion for Reconsideration"].

<sup>4</sup> Order No. 3441, Order Resolving Motion for Reconsideration of Commission Order No. 3047, PRC Docket No. R2013-10R (July 20, 2016).

<sup>5</sup> *United States Postal Serv. v. Postal Regulatory Comm'n*, No. 16-1284 (D.C. Cir. filed Aug. 11, 2016).

## ANALYSIS

The Commission states that it has proposed 39 C.F.R. § 3001.21(d) to “clarify and streamline” the process by which interested parties may claim that a mail preparation change requires compliance with the Commission’s price cap rules,<sup>6</sup> and to protect the Postal Service from the specter of “after-the-fact price cap determinations by establishing a procedure to resolve those questions prior to implementation of the mail preparation requirement.”<sup>7</sup> These are critically important goals. As the Commission knows, and as the IMb proceeding culminating thus far in Orders No. 3047 and No. 3441 revealed, a finding that a mail preparation change requires compliance with the price cap can have a staggering impact on the Postal Service’s pricing flexibility by significantly reducing (or even eliminating altogether) the cap space available to the Postal Service.<sup>8</sup> Even the possibility of such a finding would likely be sufficient to place the Postal Service’s pricing decisions on hold pending the outcome of a cap-based challenge to a mail preparation change. Accordingly, it is crucial that the Commission establishes a process sufficiently robust that it ensures a fair and reasoned outcome, and sufficiently expedient that it will not unduly delay the Postal Service’s ability to make needed pricing and operational decisions.

---

<sup>6</sup> Order No. 3048 at 3; *accord* Order No. 3441 at 11.

<sup>7</sup> Order No. 3441 at 20; *see also id.* at 21 (rule “was intended to address the Postal Service’s concerns of unpredictability of how mail preparation changes would be handled” and to “protect[] the Postal Service from future impromptu and unpredictable challenges to its handling of mail preparation requirements with regard to the price cap”).

<sup>8</sup> As the Postal Service detailed in its Motion for Reconsideration, had it gone forward with the full-service IMb requirement in the wake of the Commission’s decision that the requirement was a “change in rates” subject to the price cap, it would have had to forgo between \$373 million and \$1.223 *billion* in expected revenue, recurring annually. See Motion for Reconsideration at 3, 54-62 (February 22, 2016).

These goals are not fully served by the Commission's proposed rule. The suggested changes described below, while not adequate to fully protect the Postal Service's pricing and operational flexibility (which is severely hampered by the substantive standard that is now under review before the D.C. Circuit), would enhance the rule's ability to facilitate the fair and efficient resolution of these motions.

**1. Discovery is Essential to Preserve Due Process and Enable Informed Decisionmaking on These Motions.**

Although Section 3001.21(d) is designed to clarify the process for challenging mail preparation requirements, the only clear procedural command in the proposed rule is the 30-day filing deadline. The Postal Service urges the Commission to add provisions that would allow for the development of an evidentiary record adequate to permit the Commission to fairly and accurately determine whether the moving party has demonstrated that a mail preparation change is subject to the price cap.

Under the substantive standard that the Commission established in Orders No. 3047 and No. 3441, mail preparation changes implicate the price cap when they impose "significant" costs on mailers.<sup>9</sup> The Postal Service maintains that this substantive standard is fundamentally flawed because it is ill-defined and because the costs mailers may incur in order to comply with a mail preparation change should not, standing alone, dictate whether such a change constitutes a de facto rate increase.<sup>10</sup> However, to the extent that the cost burden on mailers is relevant to the Commission's determination,

---

<sup>9</sup> *E.g.*, Order No. 3047 at 19; Order No. 3441 at 30-32.

<sup>10</sup> *See, e.g.*, Motion for Reconsideration at 14-16; Initial Comments of the United States Postal Service, PRC Docket No. R2013-10R (Aug. 17, 2015), at 1-2 and 21-24.

then the Commission's procedural rule should include a mechanism for determining what those costs actually are.

For example, if a mailer initiates proceedings under proposed Section 3001.21(d) claiming that the costs of complying with a mail preparation change are so high that they would effectively force that mailer to instead pay a higher rate, then the Postal Service (and the Commission) would, at a minimum, need to review information purportedly supporting that assertion. Because the movant is in the best position to describe and substantiate the expected impact of the change on its costs and operations as an initial matter, the Commission could expedite the process by requiring the moving party to file, along with its initial motion, the complete evidentiary basis for its claim.<sup>11</sup>

Beyond that initial presentation, considerations of due process, along with the Commission's important interest in informed decisionmaking, should mandate that the party challenging the change be put to its proof.<sup>12</sup> Indeed, in past proceedings, the Commission has highlighted the need for both the Postal Service and interested parties challenging Postal Service decisions to "provide the requisite support for their position" in order to assist the Commission in "efficiently and effectively fulfill[ing] its statutory

---

<sup>11</sup> Such a requirement would, in a sense, be analogous to the requirements imposed on complaints. See 39 C.F.R. § 3030.10(a). However, in challenges to mail preparation changes, a mailer need not obtain discovery from the Postal Service in order to prove its case because such cases depend entirely on the purported cost or operational burdens that such changes impose on mailers – information that mailers have but that the Postal Service does not.

<sup>12</sup> See, e.g., *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 63 (D.C. Cir. 1999) (due process forbids agencies to use evidence in a way that forecloses parties of an opportunity to rebut it); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55-56 (D.C. Cir. 1977) (discussing importance of adversarial comment and discussion of evidence "to the proper functioning of the agency decisionmaking and judicial review processes").

responsibilities.”<sup>13</sup> Accordingly, the Commission’s rule should include provisions authorizing the Postal Service to engage in discovery – perhaps a 15-day period for serving discovery requests on the movant, followed by a 7-day period for filing responses (subject to reasonable extensions that the Commission may grant in its discretion) – that would assist the Commission and the Postal Service (along with other interested parties responding to a motion) with evaluating whether the moving party has met its burden of demonstrating that the change imposes costs and burdens significant enough to require compliance with the price cap rules.

Even if the movant could demonstrate that it would itself incur “significant” costs in complying with a mail preparation change, additional information may be necessary to evaluate the merits of a motion fully and fairly. The “significance” analysis under the second prong of the Commission’s standard suggests that the relevant question is not merely whether a single given mailer would incur such costs but rather whether mailers affected by the change would collectively incur such significant costs.<sup>14</sup> Another potentially relevant area of inquiry is whether mailer costs will be incurred on a one-time or recurring basis. Accordingly, the Commission’s procedures should also allow for expedited third-party discovery where necessary to allow the Commission to reach a fair and reasoned decision on whether the costs incurred by mailers affected by the mail preparation change are sufficiently significant to constitute a change in rates.

---

<sup>13</sup> Order No. 1366, Order on Motion to Dismiss Holding Complaint in Abeyance Pending Further Proceeding, PRC Docket No. C2012-1 (June 13, 2012), at 14-15 & n. 18.

<sup>14</sup> See, e.g., Order No. 3441 at 30 (“Measuring the effect of the change on a rate cell requires looking to the mailers’ costs and operational adjustments required to meet that change in order to determine whether the nature of the rate cell itself is changed significantly as to constitute a ‘redefinition.’”).

## **2. The Rule Should Include a Specific Timeline for Resolution.**

The need for a robust evidentiary record is equaled by the need for expeditious resolution of disputes. The Commission has stated that the purpose of the proposed rule is to create a process that would “avoid after-the-fact price cap determinations by establishing a procedure to resolve those questions prior to implementation of the mail preparation requirement.”<sup>15</sup> The Notice of Proposed Rulemaking further explains that the proposed rule should allow the Postal Service to implement mail preparation changes “with minimal disruption,” and is not intended to stay implementation of a mail preparation change that is the subject of a motion.<sup>16</sup>

The Postal Service agrees with the Commission that any price-cap consequences of a proposed mail preparation change must be resolved before the change goes into effect. Because a finding that a mail preparation change requires compliance with the price cap can sharply curtail the Postal Service’s pricing flexibility, the Postal Service generally must know the outcome of a mail-preparation motion before going forward with its pricing plans.

As currently drafted, however, the proposed rule does not impose a deadline for resolving motions under Section 3001.21(d). Accordingly, such proceedings have the potential of delaying, indefinitely, not only the implementation of the proposed mail preparation change but also the development of the Postal Service’s rate design and the market-dominant rate changes that the Postal Service is entitled to make at “regular intervals” under the Postal Accountability and Enhancement Act (PAEA).<sup>17</sup>

---

<sup>15</sup> Order No. 3441 at 20 (emphasis added).

<sup>16</sup> Order No. 3048 at 5.

<sup>17</sup> See *generally* 39 U.S.C. § 3622.

In short, as the Commission's proposed 30-day filing deadline implicitly recognizes, time is of the essence when proposed mail preparation changes are alleged to require compliance with the price cap. To mitigate disruption of postal operations and to help facilitate efficient mailer implementation of the anticipated change, the Postal Service recommends including in proposed rule 3001.21(d) a specific timeline within which motions should be decided. Given that Postal Service proposals to change market-dominant rates must be resolved within forty-five (45) calendar days,<sup>18</sup> and that proposals to exceed the price cap for "extraordinary or exceptional circumstances" must be resolved within ninety (90) calendar days,<sup>19</sup> a corresponding temporal limitation should exist for proceedings in which an interested party contends that a proposed mail preparation change is subject to the price cap limitations.

Specifically, the Postal Service proposes that the Commission be required to resolve motions challenging changes to mail preparation requirements within sixty (60) calendar days of their filing. This will give the Postal Service time to consider (and if necessary, rebut) the factual showing presented in the motion and in any related discovery, and the Commission a reasonable period of time to resolve the dispute. At the same time, placing such definite time limits will help mitigate the uncertainty that the Postal Service and the mailing community face when mail preparation requirements are alleged to have price-cap implications that could affect an upcoming market-dominant rate change filing.

---

<sup>18</sup> *Id.* § 3622(d)(1)(C).

<sup>19</sup> *Id.* § 3622(d)(1)(E).



**3. The Rule Should Include a Meet and Confer Requirement to Encourage Discussion and Potential Resolution Prior to Filing.**

Third, the Postal Service suggests that proposed Section 3001.21(d) should require motions to include a certification stating that, prior to filing, the moving party attempted to meet or confer with the Postal Service's General Counsel to discuss its belief that the change requires compliance with the price cap rules. This provision, which would be similar to a requirement that is included in the Commission's rules for complaints,<sup>20</sup> would encourage discussion of mailer concerns prior to filing, helping to ensure that both sides have an informed understanding of the effects and implications of the planned change, and potentially avoiding the time and resources that would be expended if the Commission is asked to resolve the dispute.

**4. The Commission Should Avoid Use of the Term "Rate Effects."**

Finally, the Postal Service recommends that the Commission make a minor change to proposed Section 3001.21(d) to avoid inserting a substantive standard into a procedural rule. The Notice of Proposed Rulemaking makes clear that the proposed rule is procedural in nature – it establishes a process and timeline for motions regarding mail preparation changes.<sup>21</sup> However, by using the term "rate effects," the rule unnecessarily and confusingly hints at the substantive standard for determining whether a new mail preparation requirement implicates the price cap.<sup>22</sup> Because the substantive

---

<sup>20</sup> See 39 CFR § 3030.10(a)(9).

<sup>21</sup> See Order No. 3048 at 3-5.

<sup>22</sup> As the Postal Service noted in its Motion for Reconsideration, all new or altered mail preparation requirements can have "rate effects" by virtue of the fact that, if a mailer does not satisfy that new or altered requirement, it cannot avail itself of the rate charged for the product in question. See Motion for Reconsideration at 4. The Commission purports to define the universe of cap-implicating mail preparation requirements more narrowly than that (see, e.g., Order No. 3441 at 8-10), but the use of the phrase "rate effects" in the procedural rule here creates unnecessary ambiguity and potential confusion.

standard that the Commission adopted under Orders No. 3047 and No. 3441 is presently the subject of a review proceeding in the D.C. Circuit, the Postal Service recommends that the rule not refer to the substantive standard, but instead be written in a manner that would apply regardless of the appellate outcome. Specifically, the Postal Service proposes replacing the phrase “the change has a rate effect requiring compliance” from the first sentence of the proposed rule with the phrase “the change requires compliance.” That change will avoid the controversy over the substantive standard without altering the meaning of the sentence in question. As re-written, the first sentence of Section 3010.21(d) would provide:

Motions regarding mail preparation changes are challenges to instances where an announced mail preparation change does not contain a Postal Service indication that the change requires compliance with § 3010.23(d)(2) of this chapter.

### **CONCLUSION**

For the foregoing reasons, the Postal Service respectfully requests that the Commission consider these Comments in promulgating any final rules for motions concerning mail preparation changes.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Richard T. Cooper  
Managing Counsel, Corporate & Postal  
Business Law

R. Andrew German  
Managing Counsel, Legal Strategy

Daniel J. Foucheaux, Jr.  
Chief Counsel, Pricing & Product Support

David C. Belt  
Kara C. Marcello  
Valerie J. Pelton  
David H. Rubin  
Ashley S. Silberhorn  
Maria W. Votsch

475 L'Enfant Plaza West, S.W.  
Washington, D.C. 20260-1101  
(202) 268-6525, FAX: -6187  
September 2, 2016